Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 366.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, et al.,
Defendants in Error.

MOTION ON BEHALF OF THE PLAINTIFF IN ERROR FOR AN ORDER AMENDING PETITION FOR WRIT OF ERROR OR, IF THIS MOTION IS DENIED, FOR AN ORDER DISMISSING THE WRIT OF ERROR.

To the Honorable, the Supreme Court of the United States:

Comes now the plaintiff in error above named and moves the court as follows:

I.

For an order amending the petition for writ of error herein by striking out from the first paragraph thereof the words "29th day of June," and inserting in place thereof the words "30th day of July."

II.

If the foregoing motion is denied, for an order dismissing the writ of error herein on the ground that the decision sought to be reviewed is not the final judgment of the supreme court of the state of Washington.

The foregoing motions are based on the record herein and on the statement hereto attached.

C. W. BUNN and
JAMES B. KERR,
Counsel for Plaintiff in Error.

STATEMENT.

I.

The opinion of the supreme court of Washington in this cause was filed on June 29th, 1901, and concluded with this language: "In consideration of all the circumstances surrounding this case, and of the underlying principles governing rights and remedies, we are of opinion that the judgment should be affirmed."

On July 30th, 1901, in pursuance of this opinion, a formal judgment of affirmance and for costs was entered in the same court. A copy of this judgment is attached hereto, marked Exhibit "A."

The petition for writ of error herein, a copy of which is hereto attached, marked Exhibit "B," through a mistake as to the date of the entry of the judgment of affirmance, prayed a writ of error "to review a certain judgment entered in said court on the 29*th day of June*, 1901." This was the date of the *opinion*, but not the date of the *judgment*.

Upon this petition a writ of error was allowed. It is in the usual form and a copy is hereto attached, marked Exhibit "C."

The erroneous statement of the date of the judgment sought to be reviewed was a plain inadvertence. The plaintiff in error asks leave to amend the petition so that it will correctly state the date of the judgment of the court below.

II.

If the court declines leave to amend, the plaintiff in error desires to dismiss this writ of error. Upon discovering the mistake in the petition the plaintiff in error sued out a second writ of error to review the judgment to which return has been duly made and that cause is docketed as No. 392, October Term, 1903. The proceedings in No. 392 are regular in all respects unless the writ of error in this case No. 366 is sufficient to review the final judgment below and the writ of error docketed as No. 392 is irregular because it is a second writ of error to review the same judgment.

As bearing on the practice in this court in such cases the court is referred to *Wheeler v. Harris*, 13 Wall. 51.

Respectfully submitted,

C. W. BUNN and

JAMES B. KERR,

Counsel for Plaintiff in Error.

EXHIBIT A.

In the Supreme Court of the State of Washington.
Tuesday, July 30, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant.

vs. No. 3681.

WILLIAM S. ELY, et al.,
Respondents.

JUDGMENT.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Spokane county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on this 30th day of July, A. D. 1901, on motion of Samuel R. Stern, Esquire, of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, and that the said William S. Ely, et al., have and recover of and from the said Northern Pacific Railway Company and from F. H. Mason and Henry M. Richards, sureties, the costs of this action taxed and allowed at one hundred and thirty-one and 25-100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

EXHIBIT B.

STATE OF WASHINGTON, In Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, MARVIN ARNOLD, JULIA Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Annna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheek Bank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea, administrator of estate of James Laughlin, deceased,

Defendants in Error.

Now comes the Northern Pacific Railway Company, a corporation, plaintiff in error, and prays that a writ of error in the above entitled case may issue

to said the supreme court for the state of Washington, to review a certain judgment entered in said court on the 29th day of June, 1901, in favor of the said William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheek Bank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi and William Albi, Henry Willey and Sarah Willey, the heirs of James Laughlin, deceased, John Kildea, as administrator of James Laughlin, deceased, defendants in error, and against the said Northern Pacific Railway Company, plaintiff in error, affirming a judgment entered in the superior court of the state of Washington, in and for the county of Spokane, in favor of said defendants in error, for the reason that manifest error hath intervened in the rendition of said judgment of said Supreme Court of the state of Washington to the great damage of the said plaintiff in error, and the said Northern Pacific Railway Company, plaintiff in error, assigns the following errors in the rendition of said judgment by the Supreme Court of Washington:

1. The court erred in affirming the judgment of

the superior court of the state of Washington, in and for the county of Spokane.

2. The court erred in holding and deciding that any portion of the right of way granted by that certain act of congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route," to the Northern Pacific Railroad Company, could be acquired by adverse possession and occupation of the defendants under the statutes of Washington.

3. The court erred in denying the title of the Northern Pacific Railway Company to the premises in controversy founded upon the grant by the United States to the Northern Pacific Railroad Company, the predecessor in interest of said Northern Pacific Railway Company.

4. The court erred in holding and deciding that any portion of the right of way in controversy could be alienated by the Northern Pacific Railway Company or its predecessor in interest, the Northern Pacific Railroad Company.

5. The court erred in holding and deciding that any portion of the right of way in controversy was lost by the Northern Pacific Railway Company, or its predecessor in interest, the Northern Pacific Railroad Company, by abandonment or by acquiescence in the occupation and improvement thereof by said defendants.

6. The court erred in holding and deciding that any portion of the right of way in controversy was lost by the Northern Pacific Railway Company, or its predecessor in interest, the Northern Pacific Railroad Company, by estoppel.

7. The court erred in its judgment wherein and whereby it held that the defendants in error had the right to use and occupy the premises in controversy notwithstanding the grant thereof under the said act of congress of July 2, 1864, to the said Northern Pacific Railroad Company, the predecessor in interest of the plaintiff in error.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN,
H. M. STEPHENS,
JOHN M. BUNN,
Its Attorneys.

Writ allowed.

MARK A. FULLERTON,
Chief Justice and Presiding Justice of
the Supreme Court of Washington.

ENDORSEMENT.

3681. Filed May 29, 1903. C. S. Reinhart, clerk.

EXHIBIT C.

UNITED STATES OF AMERICA.

The President of the United States, to the Honorable Supreme Court of the state of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court of the state of Washington before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had, in a suit between Northern Pacific Railway Company, plaintiff, and William S. Ely, Marvin Arnold, Julia Arnold, Covert August, Pauline E. August, Michael Blessing, Mary Blessing, John J. Browne, Anna W. Browne, Z. Colby, Sophia Colby, Equitable Trust Company (otherwise known as the Jennings Trust Company), Joseph B. Goodner, Sallie Goodner, Eugene G. Germond, Claudia A. Germond, Anton Hahn, I. S. Kaufman, Claribel Kaufman, Jacob Loertcher, James McKenzie, Jennie McKenzie, Northwestern and Pacific Hypotheek Bank, Gustave Reith, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi, William Albi, Henry Willey, Sarah Willey, the heirs of James Laughlin, deceased, and John Kildea, as administrator of the estate of James Laughlin, deceased, defendants, wherein was drawn in question the validity of a statute or an authority exercised under the United States, and the decision was against its va-

lidity, a manifest error hath intervened, to the great damage of the said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, chief Justice of the said supreme court, this 28th day of May, in the year of our Lord one thousand nine hundred and three.

(Seal)

A. REEVES AYERS,
Clerk of the Circuit Court of the United States for the District of Washington.

The above writ is hereby allowed.

MARK A. FULLERTON,
Chief Justice Supreme Court, of Washington.

SUPREME COURT OF THE UNITED STATES.
October Term, 1903.

No. 366.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, et al.,

To Mr. Samuel R. Stern,
Attorney for William S. Ely.

Mr. F. T. Post,
Attorney for John J. Browne, Anna W. Browne, Isaac S. Kaufman, Claribel Kaufman, Equitable Trust Company (otherwise known as Jennings Trust Company), Northwestern and Pacific Hypotheek Bank, Jennie McKenzie, James McKenzie, Joseph B. Goodner, Sallie Goodner, Covert August, Pauline E. August, Henry Willey and Sarah Willey.

Messrs. Henley, Kellam & Lindsley,
Attorneys for Jacob Loertcher, Eugene G. Germond, Claudia A. Germond, Olof Hammerlund, Carl J. Berggren, W. F. Mitchem, Ida Mitchem, James Albi and William Albi.

Messrs Scott & Rosslow and
Mr. John B. Hess,
Attorneys for Anton Hahn, Z. Colby and Sophia Colby.

Mr. James Dawson,
Attorney for Gustave Reith, Marvin Arnold, Julia Arnold, Michael Blessing, Mary Blessing and John Kildea, as administrator of the estate of James Laughlin, deceased.

You will please take notice that the undersigned will move the court on the first day of October Term, 1903, of said court, namely, on October 12th, 1903, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order amending the petition for writ of error herein, and if such motion shall be denied, for an order dismissing the writ of error herein. A printed copy of such motion and the statement on which it is based is herewith served upon you.

Dated September 3rd, 1903.

C. W. BUNN and
JAMES B. KERR,
Counsel for Northern Pacific Railway Company, Plaintiff in Error.